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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/705,178	11/10/2003	Donald E. Weder	8404.020	4659

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EXAMINER
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GELLNER, JEFFREY L

ART UNIT	PAPER NUMBER
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3643

DATE MAILED: 03/16/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

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<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	10/705,178		WEDER, DONALD E.	
	<b>Examiner</b>		<b>Art Unit</b>	
	Jeffrey L. Gellner		3643	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 10 November 2003.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-7 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Information Disclosure Statement***

Acknowledgement is made of Applicant's IDS entered 10 November 2003. Examiner requests that Applicant submit a copy of document BP of the 1449. Document BP is "Exhibits A, B & C: photos . . . Clarytons . . .": A signed and completed 1449 will accompany the next office action.

### ***Specification***

The disclosure is objected to because of the following informality:

The "CROSS REFERENCE TO RELATED APPLICATIONS" should be updated to show that 10/236,100 is now US 6,675,531 B2.

In addition, the specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: In claim 1 the "flower pot cover" of line 2 is not disclosed in paragraphs 73 and 74 of the specification where the claimed embodiment of the instant application is discussed.

Appropriate correction is required.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686

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F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-7 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of U.S. Patent No. 6,675,531 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other because:

Both sets of claims are drawn to a plant cover or its obvious method use the pot cover having a base with expansion elements that are pleats and a skirt with the inner peripheral surface of the base adjacent to and contacting with the outer peripheral surface of the skirt. The limitations on the dependent claims are similar to both documents.

Claims 1-7 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of U.S. Patent No. 6,474,019 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because:

Both sets of claims are drawn to a plant cover or its obvious method use the pot cover having a base with expansion elements that are pleats and a skirt with the inner peripheral surface of the base adjacent to and contacting with the outer peripheral surface of the skirt. The limitations on the dependent claims are similar to both documents.

Claims 1-7 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5, 8, and 9 of U.S. Patent No. 5,974,736.

Although the conflicting claims are not identical, they are not patentably distinct from each other because:

Both sets of claims are drawn to a plant cover having a base with expansion elements that are pleats and a skirt with the inner peripheral surface of the base adjacent to and contacting with the outer peripheral surface of the skirt. The limitations on the dependent claims are similar to both documents.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, and 4 are rejected under 35 U.S.C. §102(b) as being anticipated by Rothfuss (US 2,302,259; document AJ on Applicant's 1449).

As to Claim 1, Rothfuss discloses a flower pot cover Figs. 6,7, 9 and 10) having an upper end, a lower end, an outer peripheral surface, an inner peripheral surface and an inner retaining space (when used as in Figs. 6 or 10), the flower pot cover having a skirt (31 or 34 of Figs. 7 or 9) integrally connected to and extending a distance from the upper end of the flower pot cover; a base (30 or 33 of Figs. 7 or 9) having an upper end, a lower end, an outer peripheral surface and an inner peripheral surface, the base having a plurality of expansion elements (pleats shown in

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Fig. 6 for element 30) extending thereabout wherein each expansion element comprises one or more areas of excess material shaped in the form of a pleat (pleats shown in Fig. 6 for element 30) which extends generally from the lower end to near the upper end of the base; and wherein the base may be disposed (shown in Fig. 7) over the outer peripheral surface of the flower pot cover such that the inner peripheral surface of the base is adjacent to and in contacting engagement with the outer peripheral surface of the flower pot cover (shown in Fig. 7), the base being disposed generally between the upper end and the lower end of the flower pot cover (Fig. 7), wherein the expansion elements permit the base to expand and contract to both closely encompass and follow the contours of the flower pot cover disposed about the pot (Fig. 6), thereby forming the plant cover (Fig. 6).

As to Claims 2 and 4, Rothfuss further discloses the flower pot cover as a polymer (page 2 col. 1 lines 31-54) and the base as a polymer (page 2 col. 1 lines 31-54).

### ***Claim Rejections - 35 USC §103***

The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3 and 5 are rejected under 35 U.S.C. §103(a) as being unpatentable over Rothfuss (US 2,302,259; document AJ on Applicant's 1449) in view of Weder et al. (US 5,152,101).

As to Claim 3, the limitations of Claim 1 are disclosed as described above. Not disclosed is the flower pot cover having a thickness of from 0.1 to 30 mil. Weder et al. ('101), however,

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discloses a flower pot cover (14 of Fig. 1) with a thickness of from 0.1 to 30 mil (col. 3 lines 1-10). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the plant cover of Rothfuss by making the flower pot cover in a thickness of from 0.1 to 30 mil so as to save on costs of manufacturing.

As to Claim 5, the limitations of Claim 1 are disclosed as described above. Not disclosed is the flower pot cover having a thickness of from 0.1 to 30 mil. Weder et al. ('101), however, discloses a flower pot cover (14 of Fig. 1) with a thickness of from 0.1 to 30 mil (col. 3 lines 1-10). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the plant cover of Rothfuss by making the flower pot cover in a thickness of from 0.1 to 30 mil so as to save on costs of manufacturing.

Claims 6 and 7 are rejected under 35 U.S.C. §103(a) as being unpatentable over Rothfuss (US 2,302,259; document AJ on Applicant's 1449) in view of Boehm (US 4,054,703).

As to Claim 6, the limitations of Claim 1 are disclosed as described above. Not disclosed is either the flower pot cover or the base having an adhesive bonding material. Boehm, however, discloses either a skirt 24 of Fig. 4) or base (28 of Fig. 4) having an adhesive bonding material (col. 3 lines 11-18). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the plant cover of Rothfuss by using an adhesive as disclosed by Boehm so as to ensure the flower pot cover and base are perfectly aligned before construction (see Boehm at col. 3 lines 20-27).

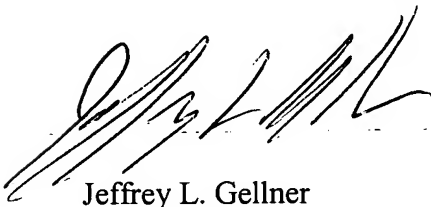
***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. JP 2002-255244, Kojima, Toltzman, and Hauptmann disclose in the prior art various bases with skirts.

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Jeffrey L. Gellner whose phone number is 703.305.0053. The Examiner can normally be reached Monday through Thursday from 8:30 am to 4:00 pm. The Examiner can also be reached on alternate Fridays.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Supervisor, Peter Poon, can be reached at 703.308.2574. The official fax telephone number for the Technology Center where this application or proceeding is assigned is 703.872.9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703.308.1113.

A handwritten signature in black ink, appearing to read 'J. L. Gellner', is written over a horizontal dotted line.

Jeffrey L. Gellner